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**The Commonwealth of Massachusetts
HEALTH FACILITIES APPEALS BOARD
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William Kaleva, Administrator

**NATIONAL MEDICAL CARE, INC., d/b/a BMA OF WESTWOOD, Appellant
v. Department of Public Health, Appellee**

DoN Project No. 4-4730

National Medical Care, Inc., d/b/a BMA of Westwood ("BMA") has appealed the decision of the Department of Public Health ("the Department") to condition approval of BMA's application for a Determination of Need ("DoN") for construction of a new dialysis facility in Westwood, Massachusetts, upon BMA's providing patients with access to "single use dialysis" in the new facility.¹

The Public Health Council, acting as the Department, approved the DoN subject to several conditions at its meeting of July 21, 1987. The condition requiring patient access to single use dialysis was set forth in the Department's notice

¹At least two types of dialyzers are in use in this country to remove impurities in the blood: reusable and single use. Reusable dialyzers are ordinarily cleaned, sterilized and reused by the same patient. Single use dialyzers are used only once.

of DoN dated September 2, 1987. BMA filed a timely appeal with this Board. An Amicus Curiae brief in support of the Department was filed by the Michael E. Lisieski Ten Taxpayer Group.

BMA challenges only the imposition of the fifth condition of the DoN, which reads as follows:

5. BMA of Westwood shall provide access to single use dialysis, including patients already dialyzing at the facility.
 - a) All patients entering the facility or already at the facility shall be informed of this choice in writing.
 - b) Patients desiring single-use dialysis shall not be discriminated against either in access to the facility or in access to convenient dialysis times.
 - c) In conformance with 105 CMR 100.522(B), the facility shall file the required reports concerning this condition with the DoN Program Director as well as with the Michael E. Lisieski Ten Taxpayer Group.

BMA challenges this condition on several grounds, but we reach only the claim that the record contains no reasonable basis for imposing the requirement. Because we agree and find that the Department abused its discretion in this regard, we do not consider any of the other grounds for appeal.

The Department has discretion to subject determinations of need to terms and conditions which are consistent with the DoN Program's objective of making adequate health care

services reasonably available at the lowest possible cost.² Such conditions, however, must be prescribed reasonably and supported by the record.³ In this case, no evidence appears in the record that the provision of adequate health care services would be jeopardized by BMA's failure to offer single use dialysis to its patients. The only evidence on the re-use issue appearing in the record at all is the analysis of the Department's Program Analyst indicating that dialysis with reusable dialyzers is generally regarded as safe and effective,⁴ and the staff's recommendation against requiring BMA to provide single use dialysis.⁵ While the Ten Taxpayer Group argued that some patients are wary of reusable dialyzers and prefer single use dialysis, it presented no evidence with respect to the safety and effectiveness of either form of dialysis.⁶

The safety or efficacy of either reuse or single use dialysis is not at issue before this Board. For purposes of

²MGL c. 111 sec. 25C; 105 CMR 100.532 and 100.550.

³Cf. Brenner, Hicks and Mental Patient Liberation Front Ten Taxpayer Groups v. DPH, in re Lemuel Shattuck Hospital, HFAB No. 4-2734, Final Decision Following Remand, 2/11/81.

⁴Tr. at 4. At a meeting on April 21, 1987, the Public Health Council requested a Program Analyst to review the literature on reuse. The full written report is contained in the memorandum from Marilyn Bowman dated July 21, 1987, issued June 30, 1987, Staff Summary, Attachment I, and summarized by her at the July 21, 1987 meeting. Tr. at 4.

⁵Staff Summary at 19.

⁶We note that, although not required, the Department did not receive any complaints about reuse from Westwood area patients. The Lisieski Ten Taxpayer Group's position appears to be based on statements of patient preferences.

this appeal, the Department maintains that reuse is safe if done properly.⁷ Therefore, the Department does not claim that the condition was imposed for the purpose of ensuring adequate safety in the dialysis services to be offered at the new facility.

The Department contends, instead, that the condition requiring BMA to offer single use dialysis is consistent with providing patients a choice between reuse or single use. The Ten Taxpayer Group recommended that such a condition be imposed because many patients prefer to be given such a choice. The only reason stated in the Department's notice of DoN dated September 2, 1987, for imposing the condition is the following: "The Department attached the TTG's condition to approval of the application in recognition of the importance of patient choice in dialysis treatment." There is nothing in the record, however, to indicate that the Public Health Council specifically considered this issue. In fact, the staff summary presented to the Council found that access to single use would be adequately available in the relevant area because three comparable applicants that were approved agreed voluntarily to offer patients single use.⁸

⁷Department staff also stated that "reuse is safe, is done correctly." Staff Summary at Tr. at 4. There is nothing in the record to suggest, and the Department does not claim, that BMA will not conduct proper procedures for reuse.

⁸Four applications were deemed comparable to that of BMA, one of which was denied. The other three applicants that were approved voluntarily agreed to accept the single use condition. Department staff concluded that enough dialysis facilities would offer single use to provide patients with "freedom of choice." Tr. at 4-5. We note that there is nothing to prevent BMA from offering patients single use dialysis even

The Department also argues that the condition is consistent with its Determination of Need Guidelines for End Stage Renal Disease adopted in June 1985. Under such Guidelines, the Operational Objectives which must be satisfied pursuant to 105 CMR 100.533(A) are deemed to include a "treatment environment [which] should be flexible in order to meet the medical, social and psychological needs of patients."⁹ The Department now contends, for the first time it seems, that patients' "psychological needs" include freedom of choice on whether to reuse. However, the Department produced no evidence to support this new interpretation of the Guidelines. As the Staff summary notes, patients may elect to undergo dialysis at a facility that offers single use if they prefer. In any event, aside from the Department's notice of DoN itself, the record is devoid of any indication that the single use condition was imposed on BMA for this reason.

The Department now takes the position that the single use condition will be imposed on all future applicants for dialysis facilities as a matter of DoN policy. While the Department may adopt relevant policies of general application upon compliance with statutory requirements, it did not do so

in the absence of the condition. At the July 21, 1987 meeting, BMA indicated that it may offer single use to patients for whom reuse is medically inappropriate. Tr. at 33. It also indicated its belief that "the choice of a reuse or a single use kidney is a medical decision." Id. While that statement may indicate insensitivity to patient values, it is not relevant to the issue on appeal.

⁹DoN Guidelines for ESRD at 9.

in this case. It attached a specific condition to the approval of the application of a single applicant. Our decision in Cape Cod Hospital v. Department of Public Health¹⁰ confirms that the Department must have sound reasons for imposing a condition on a particular applicant. In that case, the Department imposed a condition "to ameliorate what it perceived to be a serious problem of inadequate access to care" at the facility applying for a DoN.¹¹ The problem was known to both the applicant and the Department, the Department gathered information to identify the problem, measures for solving it to permit the approval of a DoN were discussed, and the condition was directly tailored both to the applicant and the Program objectives.¹² Virtually none of these factors are present in the case of BMA.

The transcript of the Public Health Council meeting of July 21, 1987, is sparse in the extreme. Discussion of the desirability of imposing the condition was limited to a few brief remarks, parts of which were not recorded in the transcript.¹³ In the absence of any clear indication in the record that the Department actually considered the need for imposing the condition in order to further the objectives of

¹⁰HFAB No. 5-3384, June 11, 1987.

¹¹DoN Guidelines for ESRD at 2.

¹²See also, St. Joseph's Hospital v. Dept. of Public Health, HFAB No. 3-3238, April 10, 1986.

¹³Tr. at 32, 35-36. The transcript does not record which condition the Council was discussing. It now appears that the fifth condition was at issue, as presented in the Department's notice of DoN issued thereafter.

the DoN Program, and any information in the record indicating that provision for single use dialysis is consistent with such objectives in the case presented, the Department abused its discretion in requiring BMA to offer single use dialysis as a condition of approving its DoN application.

The decision of the Department to condition its approval of BMA's application for a DoN on condition 5, requiring BMA to provide access to single use dialysis, is reversed, and the case remanded for reconsideration or removal of the condition.

HEALTH FACILITIES APPEALS BOARD

January 19, 1988

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**Bio-Medical Applications of Cape Cod, Inc.
(DoN Project No. 5-4754)
and
Bio-Medical Applications of Boston, Inc.
(DoN Project No. 4-4756)**

**RULING ON
MOTION TO REMAND
BY DEPARTMENT OF PUBLIC HEALTH**

The Department of Public Health's Motion of March 4, 1988 to Remand the above-captioned appeals according to the terms of the Board's order in National Medical Care, Inc., d/b/a BMA of Westwood, v. Department of Public Health, DoN 4-4730 (January 19, 1988), which motion was assented to by the appellant on March 10, 1988, is hereby granted.

HFAB
March 16, 1988

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**Ann Keon Ten Taxpayer Group v.
Department of Public Health, et al.,
DoN Project #4-1108
(in the Matter of "College Park")**

**RULING ON
MOTION TO DISMISS
BY DEPARTMENT OF PUBLIC HEALTH**

The Department of Public Health's Motion to Dismiss, dated July 26, 1988, is hereby granted unless appellant amends claim of appeal by August 12, 1988 to state in what way it is aggrieved within the meaning of 113 CMR 1.01(1)(c).

HFAB
August 5, 1988

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**John C. Chakalos, d/b/a THE NEW HORIZON,
Appellant
v.
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC HEALTH,
Appellee**

DoN Project No. 2-3472

John C. Chakalos, d/b/a The New Horizon (hereinafter called TNH), has appealed the decision of the Department of Public Health (the Department) to deny TNH's application for a Determination of Need (DoN) to construct a private, 120-bed psychiatric hospital in Sturbridge, Massachusetts, which is located in HSA region II.

Procedural History

TNH filed a DoN application in September of 1986 to build a freestanding 120 bed, for-profit, psychiatric hospital in Sturbridge, Massachusetts. TNH proposed a service area encompassing HSA regions I and II. On the same day, both Holden and Milford-Whitinsville Hospitals filed DoN applications for additional psychiatric beds in the service area proposed by TNH for its facility. Cooley-Dickinson Hospital, also located in HSA region I, resubmitted a previously withdrawn application for psychiatric beds in January of 1988.

Community Care Systems, d/b/a Western Massachusetts Psychiatric Hospital (WMPH), had filed an application for construction of a freestanding 78 bed for-profit psychiatric hospital in HSA region I in September of 1984. The WMPH application was reviewed at the Public Health Council meeting on February 17, 1987. The staff recommended denial based on

the applicant's failure to satisfy DoN requirements set forth at 105 CMR 100.533 (B) (3), (5), and (7). The Public Health Council voted 3-0 (with one abstention) to approve the application, with conditions. Subsequently, and prior to consideration of TNH's application, the Department reviewed and approved the requests for psychiatric beds for Holden Hospital (11 beds), Milford-Whitinsville Regional Hospital (8 additional beds in a new 22 bed unit), and Cooley-Dickinson Hospital (24 beds).

TNH's application was reviewed at the Public Health Council meeting on April 19, 1988. The staff recommended denial based on the applicant's failure to satisfy DoN requirements set forth at 105 CMR 100.533 (B) (1), (2), (3), and (7). The Public Health Council voted 3-2 to deny the application, citing the applicant's failure to satisfy the foregoing requirements. The Department issued its notice of DoN on June 24, 1988, and this appeal ensued.

Issues on Appeal

TNH challenges almost every finding made by the Department. It claims:

1. that the Department improperly relied on "planning" as a basis for denying TNH's application for Determination of Need;
2. that the Department's contentions that TNH failed to comply with 105 CMR 100.533 (B) (1) and (B) (3) are without any basis in fact or in law;
3. that the Department's contention that TNH failed to comply with 105 CMR 100.533 (B) (2) is without any basis in law or in fact;
4. that the Department inappropriately relied on 105 CMR 100.533 (B) (7) as a basis for denying TNH's DoN;
5. that the Department's denial of TNH's DoN is inconsistent with the DoN objective of making adequate health care services reasonably available to every citizen of the Commonwealth; and
6. that the Department's action on TNH's DoN denied TNH the right to "administrative equal protection".

In support of its position and of its original application, TNH offers numerous arguments, some of which evidence disagreement with applicable determination of need policies. We consider only those allegations that might be construed as claims that the Department's decision "was an abuse of the Department's discretion, a failure to observe

procedures required by law. . . or a violation of applicable provisions of law."¹

Factor 1: Health Planning Process:

TNH appears to argue that the Department inappropriately relied on planning as a basis for its decision,² and failed to define criteria for planning.³ DoN regulations specifically require that the applicant make "a clear and convincing demonstration that the project or part meets each of the governing factors."⁴ The regulations also make clear that an applicant failing to make such a demonstration with respect to each factor is not entitled to approval of its project.⁵ The burden of proof is on the applicant.

The first factor requires that the "project, as applied for, is the product of a sound health planning process" ⁶ The regulations specify that the planning process must include "reasonable consultation, both prior to and after filing, with the appropriate HSA and any other affected health planning agency (including the Department of Mental Health for a mental health project) and, where appropriate, also with other providers, and adequate investigation prior to filing and documented consideration in the application of the substantive issues encompassed in the State Health Plan and in factors (2) to (8)."⁷

We note the text of the regulation because TNH bases much of its claim of appeal on the Department's finding that its planning process was inadequate. TNH does not claim, nor could it, that the Department should not have considered the planning process in deciding the application. On the contrary, the Department was obliged to evaluate the applicant's evidence of planning for the project. Rather, TNH asserts that the Department erred in finding that TNH did not demonstrate a sound planning process.

The Department applied the planning process criteria set forth in the Acute Adult Psychiatric Standards and Criteria Task Force Report ("Guidelines"). The Guidelines were adopted by the Department in 1979, revised several times through 1983, and were in effect at the time TNH filed its

¹113 CMR 1.01(2)(a); Mass. Gen. Laws, c.111, §25E.

²TNH Brief at 6-7.

³TNH Brief at 8-9.

⁴105 CMR 100.533(A).

⁵"If the required demonstration is not made with respect to each factor, the determination shall be of no need" 105 CMR 100.533(A).

⁶105 CMR 100.533(B)(1).

⁷Id.

application. TNH was admittedly familiar with the Guidelines and sought to describe its compliance with them in the original TNH application.⁸ TNH does not question the propriety of judging its application by the Guidelines. Instead, it argues that TNH met the Guidelines' criteria for planning, or alternatively that the Department applied the criteria more literally to TNH than to previous applicants.⁹

The first argument is directed at the degree to which the planning process contemplated by the Guidelines must be completed, either before an application is submitted or during the pendency of an application. The Guidelines express a clear policy objective of developing community based treatment and support programs. This goal was developed on the basis of reasonable evidence of improved patient outcomes and cost effectiveness stemming from community based programs. Inpatient facilities, while necessary for many patients, are viewed as serving the overall goal only insofar as they provide acute services not possible in community settings. New inpatient beds are to be integrated into the network of mental health services within the hospital's catchment area. For these reasons, it was "appropriate" (within the meaning of 105 CMR 100.533(B)(1)) in this case for the applicant to be required to conduct reasonable consultation with other providers in the area, as well as with the HSA and the Department of Mental Health.

The Guidelines also specify that a psychiatric hospital should "affirm a commitment to support the Commonwealth's goal to reduce reliance on the State mental hospital and to achieve comprehensive area-based community mental health services" by entering into a working agreement with the Department of Mental Health.¹⁰ The working agreement is to cover such issues as guidelines for admission, alternatives prior to admission, patient rights, collection and maintenance of data, treatment and discharge planning, utilization review procedures, case management and referral mechanisms, compliance with relevant statutes and regulations, and the expected role of the Department of Mental Health. The Guidelines contemplate that such a working agreement be drafted and signed when an application is submitted, as evidence of the applicant's efforts to coordinate its proposed services with existing programs.

Given the high level of public concern regarding the general availability, scope, cost, and quality of mental health services, it is hardly an abuse of discretion to emphasize, as the Department did, the requirement that TNH

⁸TNH DoN Application 2-3472 at 9, 31-37.

⁹The latter claim is discussed infra at page 14.

¹⁰Guidelines, at 20.

demonstrate a meaningful planning process that would enable the project to offer identifiably needed services within a coordinated network of programs. In South Shore Hospital v. Department of Public Health,¹¹ we cautioned the Department against denying applications for "unsound" planning where the Department had failed to provide criteria for evaluating compliance. Nonetheless that decision in no way diminishes the applicant's general obligation to satisfy the planning requirement.

In this case, unlike the circumstances involved in South Shore Hospital,¹² the Department and the applicant both relied on the planning criteria set forth in the Guidelines. The Department's objections to TNH's planning process are not mere disagreements with the conclusions reached by an applicant which had conducted extensive discussions and analysis with other institutions.

TNH's application did not discuss any such planning efforts. In response to a Staff request for additional information, TNH replied that it had not solicited expressions of interest from community-based agencies or psychiatrists because such information would not be indicative of need for the project, and would not be a valid indication of TNH's ability to meet Departmental requirements.¹³ Ultimately, TNH provided evidence only of introductory letters to area providers (initiated almost 18 months after the application was submitted), with the promise or hope that some would be followed up. Under the circumstances, the Department had a reasonable basis for concluding that TNH failed to provide the clear and convincing demonstration that its project was the product of "a sound health planning process," as required by the regulations.

Factor 3: Operational Objectives:

TNH argues that the Department abused its discretion in finding that the applicant failed to satisfy Factor 3.¹⁴ The record, however, contains ample evidence supporting the

¹¹HFAB Nos. 4-3023 & 4-3025 (November 4, 1983).

¹²Ibid.

¹³Letter of R.T. Fleming to B. Walker, dated Jan. 8, 1988, at p. 17.

¹⁴105 CMR 100.533(8)(3) (The project will produce a facility or service which is capable of operating efficiently and effectively and which relates to other facilities and services so as to promote and further coordination and consolidation of facilities and services within the applicable service area consistent with the objective of the determination of need process. Projects designed exclusively or primarily for the mentally ill or retarded shall interrelate with the range of mental health and mental retardation services available in the Commonwealth.)

Department's conclusion. By the time of the Public Health Council's April 1988 meeting, TNH had no hospital back-up agreement to provide emergency services, no defined aftercare affiliation with any community services, and had not attempted to develop any affiliation agreements for partial or day hospitalization, or for evening or weekend treatment programs.

Given the general policy objectives set forth in the Guidelines as well as repeated statements therein that new facilities should be part of a coordinated system of mental health services, the Department's requirement that TNH identify in detail what services it would offer and how they would be linked to existing programs and providers is entirely reasonable.

TNH complains that an applicant, especially a new entrant, should not be required to produce executed final agreements. But the Department did not demand so much. It indicated that TNH had failed to produce evidence of even promising agreements in principle. It is hardly an abuse of discretion for the Department to consider that unilateral hopes that everything will turn out all right constitute insufficient evidence that an applicant will in fact be able to provide appropriate services.¹⁵

Factor 2: Health Care Requirements:

First, TNH appears to take issue with the guidelines used by the Department to evaluate need. The precise grounds for complaint, however, are somewhat contradictory. Since TNH asserts that there was need for its facility under both the Guidelines and the "Determination of Need Guidelines for Child and Adolescent Psychiatric Bed Need," any error in fact committed must be considered harmless.

The Guidelines specify the catchment area as the appropriate service area for determining need. TNH instead proposed a service area consisting of all of Regions I and II. The Department agreed to expand the service area to be used for TNH somewhat beyond the catchment area boundaries. That area included most, but not all, of Regions I and II, to a limit of 60 minutes driving time. TNH characterizes the Department's choice as arbitrary. However, any deviation

¹⁵It should be noted that, while the Department suggested that TNH's failure to produce even agreements in principle was probably attributable to the inadequacy of its planning efforts, the two factors should not be confused. Factor 3 requires assurances that the proposed project will provide an effective means of fulfilling a need for specific services. Factor 1 (planning) focuses on the adequacy of an applicant's efforts to identify that need and the range of means to fulfill it.

from the local catchment area -- including TNH's preference for all of Regions I and II -- could be considered arbitrary by that kind of reasoning. The Department's expansion of the appropriate service area beyond the local catchment area was based on a finding that the local area may be too constricted for a psychiatric hospital; its limitation of the service area to that located within an hour's drive was based on reasonable concern for family and other visitor access to hospital patients. The Department's decision thus cannot be said to be arbitrary or an abuse of discretion.

TNH takes issue with the Department's determination that only 42 psychiatric beds were needed in this individualized service area. TNH points to nothing, however, which suggests that the bed need determination was inconsistent with applicable law, or otherwise unsupported. TNH objects to the Department's refusal to include need for 39 private psychiatric beds for Region I and II patients allegedly hospitalized in eastern Massachusetts at one time in the early 1980s.¹⁶ It also objects to the Department's failure to credit TNH with bed need for patients residing outside the Commonwealth. By the time the Public Health Council acted on TNH's application it had approved applications for additional beds in TNH's proposed service area, thereby reducing bed need well below that sought by TNH or suitable for a new freestanding psychiatric hospital. The Department's determination that only 42 psychiatric beds were needed in TNH's service area thus effectively precluded TNH's proposal for a freestanding hospital of 120 beds.

We have carefully examined TNH's claims with respect to Factor 2 and find them to be without merit. In essence, TNH appears to disagree with the policy underlying the calculation of bed need and allocation of existing demand. Where, as here, the Department has applied its own properly adopted policies for calculating bed need, there is no basis for claiming that the Department has abused its discretion.

Factor 7: Relative Merit:

The Department has considerable discretion in evaluating the relative merit of an application.¹⁷ Its conclusion that TNH failed to satisfy this requirement was based, inter alia, on the fact that TNH proposed a free-standing private psychiatric hospital, while the Guidelines express a clear and strong preference for converting existing acute care beds. The Guidelines also favor projects that are well integrated into the existing array of mental health services,

¹⁶Appellant mentions a "study" from the early 1980s purporting to document this fact, [TNH Brief at 17-18] but give no citation to authority.

¹⁷105 CMR 100.533(B)(7).

can absorb patients from the state mental hospital system, and offer services to Medicaid beneficiaries and others with limited resources.

TNH, on the other hand, argues that the only alternative against which its application can be judged is another private psychiatric hospital. It contends that the private psychiatric hospital is a unique resource which should be made available in each catchment area.¹⁸ There is no basis in the Guidelines for this characterization. Again, it appears that TNH simply disagrees with determination of need policy. The fact that the Department evaluated TNH's application in light of the goals expressed in the Guidelines and the regulations cannot be considered an abuse of discretion. Rather, it is an essential part of the determination of need review process.

"Administrative Equal Protection"

TNH's final argument is that its application was not accorded "administrative equal protection" in comparison with the WMPH decision more than a year earlier. The DoN staff analysis and the Department's consideration of WMPH's application were similar in some respects to that for TNH, yet the Department rejected the staff recommendation and voted to approve WMPH's application conditionally, while it denied TNH. Thus, in effect, the Department allowed WMPH to correct application deficiencies by imposing conditions on approval, but did not permit TNH the same privilege a year and two months later.

Section 100.533(A) of the regulations requires the Department to deny a DoN if the applicant does not make a clear and convincing demonstration that the project meets each of the governing factors. An exception is permitted when the applicant makes a clear and convincing demonstration that the project is a promising alternative or substitute for existing methods of health service delivery, as described on §100.534. In that case, the Department has discretion to approve the DoN even though the application does not meet, inter alia Factor 3 (Operational Objectives), which WMPH had not met at the time its application was being considered by the Public Health Council.

§100.533(C) permits, but does not require, the Department to impose conditions on approval to remedy the applicant's failure to meet specific factors. From the information available, it appears that the Department could properly have denied WMPH's application altogether in 1987

¹⁸This appears to be inconsistent with its position on Factor 2, i.e., regardless of the finding of need for psychiatric beds, a private psychiatric facility should be approved for each catchment area.

instead of conditionally approving it. It is not clear whether WMPH fit the 105 CMR 100.534 criteria for exception because it offered promising alternatives or substitutes, and no reference exists in the record to this section as the basis for the Department's decision to grant conditional approval.

The authority for conditional approval of WMPH's application must therefore be presumed to have stemmed from the Department's general power to approve deficient applications conditionally.¹⁹ The transcript of the February 17, 1987 Public Health Council meeting at which the WMPH application was decided indicates that the Council's decision to approve WMPH conditionally was related to staff-determined need for 61 of the 78 beds requested. The Department was also concerned that any potential or theoretical alternatives might not be as or more appropriate than WMPH's proposal.²⁰

The Department clearly notified WMPH, as required, that approval was based on a series of conditions designed to correct the two factors which the Public Health Council found the applicant had failed to meet: Operational Objectives and Financial Feasibility and Capability.²¹ The issue of Relative Merit was addressed by defining WMPH as the only application before the Council to address an immediate need. The other pending applications for psychiatric beds in the area had not been declared comparable to WMPH, presumably because they had not been filed within the same filing year.

Although the propriety of WMPH's DoN is not before the Board in this appeal, we nonetheless conclude that the Department's action in conditionally approving WMPH was a permissible use of its discretion.²² The applications of TNH and WMPH, while similar in that they both proposed construction of new, freestanding, inpatient psychiatric facilities, were neither designated comparable nor were they identical. For example, WMPH had extensive experience running inpatient psychiatric services when its application came before the Public Health Council. By way of contrast, TNH had had no such experience and not until four days before the Public Health Council was to consider the TNH application at its April 19, 1988 meeting was the Department notified -- orally -- that TNH intended to contract with McLean Health

¹⁹105 CMR 100.533(C). This language is broadly permissive, limited only by the criteria for the conditions set forth in 105 CMR 100.532(A).

²⁰Staff Summary at 6, Transcript at 27 and 34.

²¹Transcript at 35.

²²Even if we assume that the Department had erred in approving the WMPH application conditionally, the remedy would not be to insist that the Department repeat the error with respect to TNH.

Services to operate its proposed facility.²³ Most importantly, however, the two applications differed in the element most critical to both decisions -- the bed need for the proposed services.²⁴

This is not, as TNH asserts, the same situation presented by Malden Hospital and North Shore Health Planning Council, Inc. v. Department of Public Health.²⁵ In that case we held, in essence, that the Department cannot make inconsistent findings in similar projects without providing a reasonable explanation for the differential treatment. The WMPH approval a year prior to the Public Health Council's action on TNH's application dramatically diminished the need for inpatient psychiatric beds in TNH's proposed service area. That fact alone makes the two applications substantially "different" rather than similar. Moreover, the Department provided a substantial, reasonable explanation for its failure to award a DoN to TNH.

Had the two applications been deemed officially comparable, or otherwise been decided together, the Department would have been obligated to ensure that a decision in favor of one and against the other was based on clearly articulated and reasonable standards for preferring one to the other.²⁶ For two decisions as widely separated in time as were these, in situations where the bed need was dramatically different, the Department need not explicitly engage in a preferential analysis.

The decision of the Department of Public Health in denying the application of TNH (DoN Project No. 2-3472) is therefore AFFIRMED.

Health Facilities Appeals Board
November 8, 1988

[James Hall did not participate in this decision.]

²³Transcript, p. 8.

²⁴See discussion of Factor 2, supra.

²⁵HFAB No. 6-2724 (January 27, 1981). Nor is the situation the same as that presented in Contractors Transport Corp. v. U.S., 537 F.2d 1160 (4th Cir. 1160) (where under substantially similar conditions applicants receive markedly different treatment in the same proceeding, Interstate Commerce Commission must state basis for uneven disposition of two applications.)

²⁶Contractors Transport Corp., supra.



